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IN THE

Supreme Court of the United States

October Term, 1964

No. 1071

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,* the owners and operators of 364 domestic television stations, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 14, 1964.

* The names of all of the petitioners are set out in Appendix A, *infra*.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated and filed on April 14, 1964, is reprinted in Appendix B, *infra*. The opinion has not yet been reported officially. The opinion of the United States District Court for the Southern District of New York, filed on September 14, 1962, reprinted as Appendix C, *infra*, is reported in 208 F. Supp. 896. Previous opinions and orders by this Court in the same proceeding are reported officially in 371 U. S. 540 (1963), 375 U. S. 39 (1963), and 375 U. S. 994 (1964), and by the Court of Appeals for the Second Circuit in 317 F. 2d 90 (1963).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on April 14, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

An antitrust consent decree against the American Society of Authors, Composers and Publishers (hereinafter referred to as "ASCAP"), the dominant music rights licensing society in the United States, orders ASCAP to grant a non-exclusive license to perform the copyrighted works in its repertory "to any user making written application therefor", and, upon receipt of a written application, to quote a fee "for the license requested." If the parties cannot agree, the decree authorizes the district court to fix the license fee.

Petitioners applied to ASCAP for a license to perform compositions in the ASCAP repertory on programs pro-

duced and shown by petitioners on their respective television stations. ASCAP refused to grant or quote a fee for the licenses requested by the petitioners unless they agreed to take a license also covering ASCAP music used in all filmed and taped television programs furnished to petitioners by independent producers during the term of the license. Such independently produced filmed programs are an entirely separate and distinct class of program material from that for which petitioners sought licenses. Petitioners then applied to the district court under the ASCAP decree to fix a fee for "the license requested."

The district court dismissed petitioners' application because of their refusal to accept the condition imposed by ASCAP. The court rejected petitioners' offer to prove that the tie-in demanded by ASCAP would permit it to abuse its monopoly power and to restrain its members from licensing their compositions directly to film producers or to petitioners on a competitive basis; and that the compulsory licensing provisions of the consent decree were enacted for the purpose of preventing just such a restraint of competition.

The questions presented are:

(1) May ASCAP refuse to issue a license requested under the compulsory licensing provisions of the antitrust judgment against it, unless the applicant agrees to acquire rights which are not requested?

(2) Should the court below, in construing the antitrust judgment against ASCAP, have considered facts showing that certain provisions literally requiring ASCAP to issue the license requested were intended to compel ASCAP to do so?

Statement of the Case

Respondent ASCAP, an unincorporated association of approximately 8,812 composers and publishers of copyrighted music, is engaged in the business of licensing music users, including television broadcasters, to perform copyrighted works owned by its members (R. 154a, 155a).* In 1961 ASCAP earned approximately $33,000,000 from all sources of revenue, of which over $19,000,000 was paid by television broadcasters and networks (R. 155a).

In 1941 the United States brought a civil action against ASCAP in the District Court for the Southern District of New York, charging ASCAP with violating Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 (Suppl. R. 1a-22a).** The complaint alleged that ASCAP, as a combination of competing copyright owners controlling over 75% of the copyrighted music performed in the United States, had obtained monopoly power in the licensing of the copyrighted musical compositions controlled by it (Suppl. App. 2a-3a, 11a-12a), and that it was abusing this monopoly power in the fixing of royalty rates and by forcing arbitrary and unreasonable terms and conditions upon

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* Page references prefixed by the symbol "R." refers to petitioners' appendix filed in the Court of Appeals for the Second Circuit in connection with petitioners' prior certiorari petition to this Court, which is Volume 1 of the record in 375 U. S. 39 (1963).

** Page references prefixed by the symbol "Suppl. R." refer to petitioners' supplementary appendix filed in the Court of Appeals for the Second Circuit following this Court's remand of the case to the Court of Appeals pursuant to its opinion and order in 375 U. S. 39 (1963) and 375 U. S. 994 (1964), which is Volume I of the record herein.

licensees (Suppl. App. 11a-12a, 14a-15a, 16a, 17a). On March 4, 1961, the district court entered a final decree, on consent, against ASCAP (R. 13a-24a).

On March 14, 1950 the decree was vacated and an amended decree entered following the decisions of two Federal courts in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948); and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948). In these lawsuits, which involved theatrical motion picture exhibitors, the courts found that the 1941 decree did not provide adequate relief against ASCAP's monopolistic practices; and that through various restrictive practices ASCAP was preventing its composer and publisher members from individually negotiating with and competing in the licensing of music performance rights to the producers of the films, which had the effect of forcing the exhibitors of such films to take performance licenses from ASCAP directly (80 F. Supp. at pp. 849-50, 894).

The 1950 amended judgment (Appendix D, *infra*) dealt with the conditions found in *Alden-Rochelle* to exist in the motion picture industry, by prohibiting ASCAP from licensing theatrical motion picture exhibitors (*infra*, p. D4). In addition, it introduced new provisions regulating ASCAP's practices in licensing music users generally, which were designed to protect against similar abuses in related fields. Section VI of the judgment ordered ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (*infra*, p. D8). Section IX (A) of the judgment further ordered that ASCAP "shall, upon receipt of a written application for a license for the right

of public performance of any, some, or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested" (*infra*, p. D11). Section IX went on to provide that in the event that the parties were unable to agree upon a reasonable fee, the music user could apply to the district court to have a fee fixed by the court (*infra*, p. D11). Section IV (B) prohibited ASCAP from "interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance" (*infra*, p. D4).

The 1950 judgment also made specific provision concerning the method of calculating the fees to be paid to ASCAP by broadcaster licensees. The judgment recognized two different bases or methods of compensation, generally referred to as "blanket" and "per program" licenses (*infra*, pp. D9-10). Section VII (A) enjoined ASCAP from issuing any licenses fixing a fee based upon the broadcaster's income from programs which do not include ASCAP compositions, unless the broadcaster desires such a "blanket" license (*infra*, p. D9). Section VII (B) ordered ASCAP, upon request, to issue "per program" licenses, the fee for which is related solely to programs in which ASCAP compositions are performed (*infra*, pp. D9-10).

Petitioners' application to the district court under the amended final judgment.

In October of 1961 the petitioners applied to ASCAP for licenses to use copyrighted compositions in the ASCAP repertory on all programs to be produced by the petitioners and shown by them on their respective television stations during the term of the licenses (*infra*, pp. B8-9; R. 44a-

46a). Petitioners did not ask ASCAP for a license to use ASCAP works on (i) network programs, *i.e.* those furnished to the television station by a television network, or (ii) programs consisting of filmed or taped material made by independent producers and subsequently rented or sold to the individual television station for telecasting (*infra*, p. B9). The latter category consists largely of theatrical motion picture films (R. 156a).

ASCAP refused to grant the licenses requested. ASCAP advised petitioners that it was prepared to issue to petitioners licenses excluding network programs, but that it would not grant to petitioners licenses covering their locally originated programs unless petitioners also agreed to take a license covering films and tapes supplied to the broadcaster by independent producers (*infra*, p. B9; R. 80a, 83a).

Under the license requested of ASCAP by petitioners, the licensing of music rights in filmed and taped programs, and the fees paid for such rights, would be determined competitively. Film producers would acquire the rights from many competing composers and publishers, or from ASCAP, and then assign them to petitioners upon their renting or purchasing the films for telecasting; or, if the producers did not do so, petitioners would acquire the rights directly from individual composers and publishers on a film-by-film basis. By insisting that petitioners agree in advance to purchase these rights from it, ASCAP precluded such competition (R. 51a-53a; 161a-166a).

Unable to reach agreement with ASCAP, petitioners applied to the district court, pursuant to Section IX of the 1950 amended final judgment, to have fees fixed for the licenses requested by them (R. 43a-49a).

The district court dismissed petitioners' application as a matter of law. It ruled that, except for certain express prohibitions and requirements imposed on ASCAP by the judgment, the judgment left ASCAP "free to negotiate with an applicant for a particular kind of license on particular terms" (*infra*, p. C2).

Following appeals both to this Court and to the Court of Appeals for the Second Circuit, and several decisions by this Court and the Court of Appeals on jurisdictional questions no longer pertinent,* the Court of Appeals affirmed the decision of the district court on its merits. It held that, notwithstanding the language of Sections VI and IX of the amended final judgment, nothing in the judgment "requires a license which excludes programs recorded by producers or, for that matter, distributed by the networks" (*infra*, p. B12). The Court rejected as irrelevant petitioners' contention that the judgment, as construed by the Court, would permit ASCAP to violate the antitrust laws by using the monopoly power inherent in its copyright pool to force petitioners to take a license covering filmed pro-

* Petitioners took an appeal from the decision of the district court both to this Court under Section 2 of the Expediting Act, 15 U. S. C. §29, and to the Court of Appeals for the Second Circuit under 28 U. S. C. §1291, 62 Stat. 929. This Court dismissed the direct appeal for lack of jurisdiction. 371 U. S. 540 (1963). Shortly thereafter, the Court of Appeals, notwithstanding the decision of this Court, dismissed the appeal pending before it on the ground that the Expediting Act deprived it of jurisdiction to hear the appeal. 317 F. 2d 90 (1963). On petition for certiorari, this Court summarily reversed the decision of the Court of Appeals and remanded the case to that court. 375 U. S. 47 (1963). Granting ASCAP's petition for rehearing, this Court amended its order of remand so as not to preclude ASCAP from contending before the Court of Appeals that petitioners' appeal was untimely. 375 U. S. 994 (1964). Following the remand, the Court of Appeals held that the appeal was timely (*infra*, p. B8) and decided the case on its merits.

gram material furnished to them by others—as to which petitioners did not seek a license from ASCAP (*infra*, pp. B15-16).

Reasons for Granting the Writ

1. This case presents an important question as to the principles that should be applied by a court in construing antitrust consent decrees generally, and, more particularly, decrees containing compulsory licensing provisions, of which many have been entered in the district courts in recent years.

Despite the express command of Sections VI and IX of the amended final judgment (pp. D8, D10-11 *infra*), which orders ASCAP to issue a license to "any user making written application therefor," and to quote a reasonable fee "for the license requested", the courts below held that ASCAP may properly refuse to quote petitioners a fee for the license requested by them, which was to perform ASCAP music on program material produced by petitioners themselves, unless the petitioners agree to take a license also covering filmed and taped program material produced and furnished to them by others.

Construed in the light of proof offered by petitioners with respect to the history and purpose of the foregoing provisions, there is little doubt that these provisions were intended to permit petitioners to obtain "the license requested" by them. The court below, however, rejected petitioners' offer of proof and in construing the decree dismissed as irrelevant (pp. B 15-16 *infra*) the fact that the interpretation adopted by it would permit ASCAP to engage in the same type of unlawful activities challenged in the United States' complaint against ASCAP and con-

demned in two federal court decisions which resulted in the adoption of the 1950 judgment (*supra*, pp. 4-6). In doing so, we submit the court below fell into error. An antitrust judgment, even when entered on consent, cannot be treated "as a contract and not as a judicial act." *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) at p. 115. Its provisions are to be read in light of the allegations of the underlying complaint. *Swift & Co.* v. *United States*, 276 U. S. 311 (1928) at p. 328. The amended final judgment herein resulted from two lengthy decisions and opinions in private litigation involving ASCAP and its members, and in fact adopted substantial portions of the decree entered in one of the private lawsuits (compare 80 F. Supp. at pp. 902-05 with Sections IV(E), (F) and XII of the amended final judgment [*infra*, pp. D4, D13]). It should not, therefore, have been construed without regard to that background and the particular abuses revealed in the litigation preceding its adoption.

It is clear that, without any form of judicial supervision or regulation, ASCAP's existence as a dominant copyright pool, and its refusal to issue the licenses requested by petitioners except on the condition that petitioners accept a license also covering an entirely separate and distinct category of program material, would be unlawful under the antitrust laws. As a combination of competing music publishers and composers who have pooled their copyrights for joint exploitation by it, ASCAP cannot lawfully use the collective power of its members to impose uniform, non-competitive terms and conditions on those who must deal with it. *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930). The individual ASCAP members, as owners of the separate monopolies represented

by their respective copyrighted works, cannot combine these monopolies to gain a competitive advantage through the exercise of the leverage power that their copyrights give to them. *United States* v. *Griffith*, 334 U. S. 100 (1948) at p. 108; *Standard Oil Co.* v. *United States*, 283 U. S. 163 (1931) at p. 174. ASCAP cannot lawfully condition the issuance to a music user of a copyright license covering one type of program material upon the purchase by the music user of a license also covering an entirely separate and distinct category of program material. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) at pp. 156-59. Such combination of competitors having monopoly power may be permitted to gain the economies and efficiencies resulting from pooling of its properties only on condition that its monopoly power be neutralized through entry of a judgment which will protect against abuse of that power, both as to price and as to other terms and conditions. *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912) at pp. 410-11; *Standard Oil Co.* v. *United States*, 283 U. S. 163 (1931) at p. 171; *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N. D. Ohio 1913) at pp. 746-747; *id.*, 217 Fed. 656 (1914) at p. 661.

All of the foregoing propositions were well-established in 1950 when the amended final judgment was adopted. In fact, they were the basis of the decisions in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which led to the adoption of the 1950 judgment. See 80 F. Supp. at pp. 848-50, 894-95. The 1950 judgment sought not only to correct the specific abuses found in the theatrical motion picture field, by prohibiting ASCAP from licensing theatrical motion picture exhibitors, Sec-

tions IV (E) and (F) [*infra*, p. D4], but also to protect other music users against like abuses of ASCAP's monopoly power. To accomplish this objective, Section IX directs ASCAP to quote a reasonable fee "for the license requested" by any applicant for a music license (*infra*, p. D11). Thus it is clear that the opening sentence of Section IX is an integral part in the regulatory scheme envisaged by the judgment, and not, as the Court of Appeals viewed it (*infra*, p. B10), merely a prefatory statement introducing the fee-setting machinery provided for in the balance of Section IX.

The court below rejected these considerations in apparent reliance on the decisions of this Court in *Hughes* v. *United States*, 342 U. S. 353 (1952), and *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959) (*infra*, p. B14). In these cases this Court held that when a consent decree contains detailed provisions addressed to a particular problem, a court cannot adopt a construction inconsistent with those detailed provisions. It does not follow that, absent such detailed provisions, the court, in construing the general language of Section IX of the judgment in this case, must close its eyes to the circumstances surrounding the adoption of the decree. The Court should grant review in order to correct the misapprehension engendered by its decisions in the two cases noted above.

Were it not for the fact that the court below erroneously deemed itself bound to ignore the specific background of this decree, we submit that the court would have found itself compelled to reach a different conclusion, since the construction urged by petitioners is not only consistent with the plain language of the judgment but also carries out its evident purpose.

In light of the background of the amended final judgment, there is every reason to conclude that the provision of Section IX requiring ASCAP to quote a reasonable fee "for the license requested" by an applicant means precisely what it says.* The scope or coverage of a particular license will inevitably vary according to the type of use involved, the number and location of the facilities for which a license is sought, and the portion of the ASCAP repertory for which music rights are sought, all of which are matters that would normally be determined by each user for himself according to his needs. By granting to each applicant the right to have a fee fixed "for the license requested," Section IX leaves it to the music user to define the scope of the license he wishes to have. The fear that applicants might make arbitrary or whimsical demands is unrealistic, since the district court has the power under Section IX to set fees for the licenses requested and to impose an interim fee pending the proceedings (*infra*, p. D11). Moreover, in entertaining applications under Section IX the district court sits as a court of equity, and therefore has the inherent authority to reject capricious or unreasonable demands.

Nothing in the other parts of the amended final judgment limits Section IX or otherwise inhibits the court from giving full effect to its provisions. Section VII of the judgment is concerned with the method of calculating the fees to be paid to ASCAP by broadcasters. The detailed provisions of Section VII are designed to prevent ASCAP from foreclosing the market to non-ASCAP composers and music publishers by forcing music users to pay a fee on

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* The United States, in memoranda submitted to the district court, has taken the position that petitioners are entitled, under Sections VI and IX of the judgment, to the licenses requested, on such terms as petitioners show to be reasonable (Suppl. R. 76a).

programs not containing ASCAP music. But aside from this one limited aspect, Section VII does not "set down in detail" or even in general terms "what licenses individual broadcasters could demand" (*cf.* p. B12 *infra*). No significance can properly be attached, therefore, to the fact that Section VII does not otherwise restrict ASCAP in the type of license it may insist upon, and the Court of Appeals erred in viewing the absence of such restrictions as a crucial factor in construing the judgment (*infra*, p. B12). Consideration of the purpose of the decree, if the Court of Appeals had felt free to take it into account, would have precluded the imputation of any such self-defeating intention to the draftsmen of Section VII. Furthermore, the explicit language of Section IX, empowering the music user to specify "the license requested," eliminated the need for any such express restrictions in another part of the judgment.

Granting the license requested by the petitioners would in no sense destroy the "option" that the producers of transcriptions or recordations have to apply for licenses under Section V, which directs ASCAP, upon request, to issue individual licenses to (i) networks, (ii) manufacturers, producers or distributors of transcriptions or recordations of compositions in ASCAP's repertory recorded for performances on specified commercially sponsored broadcasts, and (iii) motion picture producers (*infra*, pp. D5-D8). If such transcriptions or recordations are excluded from the broadcaster's own licenses with ASCAP, the producers thereof can obtain the necessary music rights directly from the music publishers or composers whose works are used, which in fact is the usual practice in the production of theatrical motion picture films (R. 161a-163a). Section V gives the producers the alternative choice

of applying for such a license from ASCAP. As a second alternative, recognized by the Court of Appeals, the producers could leave it up to the individual petitioner-broadcasters to obtain the necessary rights on a film-by-film basis (*infra*, p. B9). It is rather ASCAP's refusal to issue licenses excluding transcriptions or recordations of ASCAP music prepared by outside producers that renders the pertinent provisions of Section V inoperative since, as the Court of Appeals recognized, such producers have "scant incentive" to apply for licenses under Section V if such transcriptions or recordations are already covered by petitioners' licenses from ASCAP (*infra*, p. B14).

2. The question presented here is important not only to the television industry, which in 1962 paid fees of $20,145,064.84 to ASCAP,* but to all commercial music users, since as a practical matter all commercial users of music must have access to the ASCAP repertory and therefore are required to deal with ASCAP (R. 158a). Although this proceeding involved only a particular license sought by a particular group of music users, it establishes a precedent that will make it possible for ASCAP to dictate the terms on which it will make its repertory available also to other music users. The amended final judgment, enacted after private litigation in 1948 laid bare the inadequacies of the 1941 decree to control abuses in ASCAP's licensing practices, should not now be so restrictively interpreted as to render it ineffective to control those illegal practices.

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* *Broadcasting Magazine*, p. 70, March 18, 1963.

Since the amended final judgment lays the groundwork controlling the relationship between the dominant combination of copyright owners in the United States and all segments of the music using industry, and requires all disputes arising out of the operation of the compulsory licensing provisions of Section IX of the decree to be submitted to the District Court for the Southern District of New York, such proceedings are necessarily confined to the Second Circuit and it is impossible for a conflict between the circuits to arise. Review by this Court should not be withheld, therefore, because of the absence of such a conflict. *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126 (1942) at p. 128; *Muncie Gear Works, Inc.* v. *Outboard Marine & Manufacturing Co.*, 315 U. S. 759 (1942) at p. 766; *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U. S. 86 (1939) at p. 89; *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47 (1938) at p. 50.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Names of Petitioners for Writ of Certiorari

The A. S. Abell Co.; Abilene Radio & Television Co.; Aladdin Broadcasting Corp.; Alvarado Television Co., Inc.; Appalachian Broadcasting Corp.; Arizona Television Co.; Arkansas Radio & Equipment Co.; Arkansas Television Co.; Atlanta Newspapers, Inc.; Bakersville Broadcasting Co.; Beaumont Television Corp.; Bell Publishing Co.; A. H. Belo Corp.; Binghamton Press Company, Inc.; Biscayne Television Corporation; Bi-States Co.; Black Canon Broadcasting Co., Inc.; Black Hawk Broadcasting Co.; The Board of Curators of the University of Missouri; Brazos Broadcasting Co.; Broadcasting Co. of the South; The Brockway Company; California Northwest Broadcasting Co.; Capitol Broadcasting Co.; Capital Cities Broadcasting Co.; Carolina Broadcasting Co.; Carolina Broadcasting System, Inc.; Central Broadcasting Co.; Central Minnesota Television Co.; Central Plains Enterprises Inc.; Central-South Sales Co.; Cherry Broadcasting Co.; Chronicle Publishing Co.; City of St. Petersburg, Fla.; Columbia Empire Broadcasting Co.; Columbia Pictures Electronics Co., Inc.; Columbus Broadcasting Co., Inc.; Cook Broadcasting Co.; Cornhusker Television Corp.; Cowles Magazine & Broadcasting, Inc.; Crosley Broadcasting Corp.; Crosley Broadcasting of Atlanta, Inc.; Dickinson Radio Association; The Dispatch Printing Co.; Duhamel Enterprises, Inc.; El Mundo, Inc.; Eugene Television, Inc.; Evansville Television, Inc.; The Evening News Association; The Evening Star Broadcasting Co.; Express

Publishing Company; Fetzer Broadcasting Co.; Fetzer Television, Inc.; Fisher Broadcasting Company; Fisher's Blend Station, Inc.; Forest Capital Broadcasting Co.; Fort Meyers Broadcasting Co.; Frontier Broadcasting Co.; Georgia-Carolina Broadcasting Co.; Garryowen Butte Tv, Inc.; General Electric Co.; Glendive Broadcasting Corporation; Globe News Publishing Co.; The Goodwill Stations, Inc.; Greater Rockford Television Inc.; Great Lakes Television Co.; Great Western Broadcasting Corp.; Greensboro News Co.; Gulf Television Corp.; Guy Gannett Broadcasting Services; Harbenito Broadcasting Company; Hawaiian Broadcasting System, Limited; The Hearst Corp.; Herald Corp.; Herald Publishing Co., Inc.; Hirsch Broadcasting Co.; Houston Consolidated Television Co.; Houston Post Co.; Independent Broadcasting Co.; Indiana Broadcasting Corp.; Iowa State University; Jefferson Standard Broadcasting Co.; The Journal Co.; KCMC, Inc.; KCOP Television Inc.; KCRA, Inc.; KDAL, Inc., KELP Television Corp.; Kentuckiana Television, Inc.; Kern County Broadcasting Co.; Key Television Inc.; KFBB Broadcasting Corp.; KGUN-TV, Inc.; KHQ, Incorporated; King Broadcasting, d/b/a Pioneer Broadcasting Company; KOGO Broadcasting Corp.; KOOL Radio-Television, Inc.; KOTV, Inc.; KREM Broadcasting Company; K-SIX Television, Inc.; KSLA-TV, Inc.; KSOO-Tv, Inc.; KTAR Broadcasting Co.; KTBS, Inc.; KTIV Television Co.; KTVB, Inc.; KTVE, Inc.; KUTV, Inc.; KWTX Broadcasting Co.; Lamar Life Broadcasting Co.; Las Vegas Television, Inc.; Lee Broadcasting, Inc.; Lee Radio, Inc.; Liberty Television Inc.; Louisiana Television Broadcasting Corp.; Loyola Uni-

versity; Lynchburg Broadcasting Corp.; McClatchy Broadcasting Co.; M & M Broadcasting Co.; Maine Radio & Television Co.; Marietta Broadcasting, Inc.; Martin Theatres of Georgia, Inc.; May Broadcasting Co.; Meredith Broadcasting Co.; Meredith Syracuse TV Corp.; Meredith WOW, Inc.; Metromedia, Inc.; Metropolitan Broadcasting Corp.; Metropolitan Broadcasting Corp. of California; Metropolitan Television Co.; Meyer Broadcasting Co.; Miami Valley Broadcasting Corp.; Michiana Telecasting Corp.; Midcontinent Broadcasting Co.; Midcontinent Broadcasting Co. of Wisconsin, Inc.; Mid-Continent Telecasting, Inc.; Midland Empire Broadcasting Co.; Mid-Florida Television Corp.; Mid-New York Broadcasting Corp.; Midwestern Broadcasting Company; Midwest Radio-TV, Inc.; Mission Telecasting Corp.; Modern Broadcasting Co. of Baton Rouge, Inc.; The Montana Network; Mountain City TV, Inc.; Mt. Hood Radio & Television Broadcasting Corp.; Mt. Mansfield Television, Inc.; Mt. Washington TV, Inc.; Nafi Telecasting, Inc.; New Mexico Broadcasting Co., Inc.; Newhouse Broadcasting Corp.; New Orleans Television Corp.; Noe Enterprises, Inc.; North Carolina Television, Inc.; North Central Broadcasting Co.; North Dakota Broadcasting Co., Inc.; Northeastern Penn. Broadcasting, Inc.; Northwest TV Co.; Oklahoma Quality Broadcasting Company; Oklahoma Television Corporation; Oregon Television, Inc.; The Outlet Company; Paducah Newspaper, Inc.; Palmetto Radio Corporation; Pembina Broadcasting Co.; Peninsula Broadcasting Corp.; Peoples Broadcasting Corp.; Petersburg Television Corp.; John H. Phipps Stations; Pikes Peak

Broadcasting Co.; Plains Television Corporation; Pulitzer Publishing Co.; Queen City Broadcasting Co.; Quincy Broadcasting Company; Radio Service Corp. of Utah; Redwood Broadcasting Co., Inc.; Reeves Broadcasting & Development Corp.; Richmond Television; RKO General, Inc.; Rocket City Television, Inc.; Rock Island Broadcasting Co.; Rollins Telecasting Inc.; Sarkes Tarzian, Inc.; Savannah Broadcasting Company, Inc.; Scranton Broadcasters, Inc.; Scripps-Howard Broadcasting Company; Scripps-Howard Radio, Inc.; Shasta Telecasting Corp.; Shenandoah Life Stations, Inc.; Shenandoah Valley Broadcasting, Inc.; Snyder & Associates; South Bend Tribune Newspaper; South Central Broadcasting Corp.; Southeastern Broadcasting Co.; Southeastern Ohio Television System; Southern Minnesota Broadcasting Co.; Southern Oregon Broadcasting Co.; Southern Television Corp.; Southland Industries, Inc.; South Mississippi Television Co.; Spartan Radiocasting Co.; Springfield Television Broadcasting Corp.; Standard Electronics Corp.; Standard Radio & Television Co.; Star Broadcasting Co., Inc.; Storer Broadcasting Co.; Summit Radio Corp.; Susquehanna Broadcasting Co.; Taft Broadcasting Co.; Television Broadcasters, Inc.; Television City, Inc.; Television Company of America, Inc.; Television Corp. of Michigan, Inc.; Television Muscle Shoals, Inc.; Television Wisconsin, Inc.; Texas Goldcoast Television, Inc.; Texas Telecasting, Inc.; Texoma Broadcasters, Inc.; Robert R. Thomas, Jr.; Tidewater Teleradio, Inc.; Time-Life Broadcast, Inc.; Times-Mirror Broadcasting Company; Times-World Corp.; Topeka Broadcasting Assoc., Inc.; Transcontinent

Names of Petitioners for Writ of Certiorari

Television Corp.; The Travelers Broadcasting Service Corp.; Triangle Broadcasting Corp.; The Tribune Co.; Tribune Publishing Co.; Tri-Cities Broadcasting Company; Tri-City Broadcasting Co.; Tri-City Radio Corp.; Triple City Broadcasting Co.; Tri-State Broadcasting Co., Inc.; Truth Publishing Co., Inc.; Tulsa Broadcasting Co.; Turner-Farrar Association; TV Colorado, Inc.; Tv Denver Inc.; Twin State Broadcasting, Inc.; Valley Telecasting Co.; Veterans Broadcasting Co., Inc.; Vindicator Printing Co.; Voice of the Caverns, Inc.; Wabash Valley Broadcasting Corp.; The Washington Post Co.; WATE, Inc.; WAVE, Inc.; WBEN, Inc.; WBRE-TV, Inc.; WCSC, Inc.; WDAY, Inc.; WDEF Broadcasting Co.; WDSM TV Co.; WDSU Broadcasting Corp.; WEHT, Inc.; West Central Broadcasting Co.; Western Slope Broadcasting Co., Inc.; Westex Television Co.; Westinghouse Broadcasting Co., Inc.; WFIE, Inc.; WGAL, Inc.; WGN, Inc.; WHAS, Inc.; WHEC, Inc.; WHP, Inc.; Wichita Television Corporation, Inc.; Wichtex Radio & Television Corp.; WIIC, Inc.; Winnebago Television Corporation; Wisconsin Valley Television Corp.; WISE-TV, Inc.; WJAC, Inc.; WJHL, Inc.; WKBH Television, Inc.; WKBN Broadcasting Corp.; WKJG, Inc.; WKRG-TV, Inc.; WKST, Inc.; WKY Television System, Inc.; WLAC-TV, Inc.; WLBZ Television, Inc.; WLOK, Inc.; WMC Broadcasting Co.; WMRC, Inc.; WMT-TV, Inc.; Wometco Enterprises, Inc.; WOOD Broadcasting, Inc.; WPIT, Inc.; WPIX, Inc.; WSAV, Inc.; WSM, Inc.; WSTV, Inc.; WTAR Radio-TV Corp.; WTRF-TV, Inc.; WTWV, Inc.; Zanesville Publishing Company.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 402—September Term, 1963.

(Argued March 30, 1964 Decided April 14, 1964.)

Docket No. 28086

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee.

In the Matter of the Application

of

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Petitioners-Appellants.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal by television stations from a judgment of the District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge*, 208 F. Supp. 896 (1962), dismissing their application for a determination of reasonable fees for certain licenses sought from defendant ASCAP

allegedly pursuant to a consent decree in an action by the United States under the antitrust laws. Affirmed.

WALTER R. MANSFIELD (Donovan, Leisure, Newton & Irvine, New York, N. Y.), *for Petitioners-Appellants.*

ARTHUR H. DEAN (William Piel, Jr., New York, N. Y. and Herman Finkelstein, New York, N. Y.; Lloyd N. Cutler of Wilmer, Cutler & Pickering, Washington, D. C. and Frederick A. Terry, Jr. of Sullivan & Cromwell, New York, N. Y., of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

I.

A year ago we dismissed this appeal because of what we considered to be "the controlling force of the Expediting Act [32 Stat. 823 (1903)] in routing all appeals from final judgments [in actions by the Government under the antitrust laws] to the Supreme Court." 317 F. 2d 90, 94 (1963), a construction which we thought to follow from the language of the statute and from decisions applying it such as *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924); *United States* v. *California Co-op. Canneries*, 279 U. S. 553, 558-59 (1929); *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 201-02 (1945); and *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, 217 (1945). As our opinion indicated, we were troubled by the fact that although the order of the District Court dismissing appellants' application seemed indeed to be "final" so far as this action was concerned, the Supreme Court, without ex-

planation and over Mr. Justice Black's dissent, had dismissed the appeal that appellants had taken to it, 371 U. S. 540 (1963). We thought this might have been founded on special principles relating to applications by persons not parties to the action, dismissal of whose claims for relief therein would leave them free to pursue other remedies, and that in any event denial of jurisdiction by the Supreme Court, for whatever reason, did not give us a role under a statute from whose scheme we considered the courts of appeals to have been excluded. On appellants' petition for certiorari, the Supreme Court summarily reversed, 375 U. S. 39 (1963), explaining *per curiam* that its dismissal of the appeal that had been taken to it had been based on an "unexpressed view" that the Expediting Act was subject to an unexpressed exception with respect to a controversy which, as was deemed the case here, "is entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned."[1]

[1] The Court referred with a "Compare" to *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924), and *Aluminum Co. of America* v. *United States*, 302 U. S. 230 (1937), which we had also noted, 317 F. 2d at 92, fn. 3, in both of which it had taken jurisdiction over appeals from rulings subsequent to the final decree. The *Aluminum* case involved a controversy between the Government and the defendant. However, in the *Terminal R.R. Ass'n* case, which we erroneously thought to indicate that appellate jurisdiction in cases like the instant one lay in the Supreme Court, the opinion had characterized the issue as being between the lines serving St. Louis from the west and the east sides of the Mississippi "as to whether the former or the latter shall bear transfer charges on west-bound through freight," an issue collateral to the main objective of the antitrust suit. The Court said: "The proceedings were instituted by the west-side lines, not to vindicate the authority of the court, but to enforce rights claimed by them under the original decree" and also noted that the Government had not joined in the complaint or participated in the hearing in the District Court although it had joined the applicant lines on appeal. 266 U. S. at 27.

Appeals to the courts of appeals from final orders in such controversies were held to lie under 28 U. S. C. §1291.

The Supreme Court's description of the exception which it found implicit in the Expediting Act created a further problem of appellate jurisdiction. Before taking their appeals to the Supreme Court and to this court, appellants waited 58 days after the entry of judgment in the District Court, relying as to the latter on the provisions of 28 U. S. C. §2107 and F. R. Civ. Proc. 73(a) allowing 60 days from the entry of judgment for all parties to appeal "in any action in which the United States or an officer or agency thereof is a party." In view of the Supreme Court's characterization of the instant controversy as "entirely between private parties," which appellee thought to raise a question as to the timeliness of the appeal to this court, it petitioned the Supreme Court for rehearing and obtained a modification of the *per curiam* opinion so that the cause, instead of being "remanded to the Court of Appeals for consideration on its merits," as originally ordered, was "remanded to the Court of Appeals for further proceedings in conformity with this opinion," 375 U. S. 994 (1964); Mr. Justice Goldberg and Mr. Justice Black thought the earlier order proper. We must therefore initially pass upon appellee's contention that the appeal is untimely because not taken within the 30 days normally allowed.

It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. Section 2107 of Title 28 and F. R. Civ. Proc. 73(a) unequivocally

allow "to all parties" 60 days to appeal in any action "in which the United States or an officer or agency thereof is a party." The stated criterion is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined when the order is made. The only contrary case cited by appellee is *Virginia Land Co.* v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (5 Cir. 1953), where the court did say that the statute and Rule were "not intended to change the rule in respect to appeals by other persons from orders with which the United States had no concern simply because of the fact that the United States was a party to the proceeding below but not to the issues involved in the appeal." Whether or not we would follow that statement on such extreme facts as were there presented, we find it inapplicable here, as other courts of appeal have found when it has been cited to them. *Division of Labor Law Enforcement* v. *Stanley Restaurants, Inc.*, 228 F. 2d 420, 423 (9 Cir. 1955); *American Export Lines, Inc.* v. *Revel*, 262 F. 2d 122, 126 (4 Cir. 1958); *East* v. *Crowdus*, 302 F. 2d 645, 646-47 (8 Cir. 1962). In the Fifth Circuit case the United States had brought suit against Miami Shipbuilding Corporation for unpaid taxes and had had a receiver appointed; Virginia Land had filed a claim; four years after the United States had settled with Miami Shipbuilding and the receivership had been terminated, Virginia Land moved to have Miami Shipbuilding substituted as a respondent and to avail itself of the 60-day provision for appealing from a denial.[2] The United States had thus long since become a merely nominal party.

[2] As an alternative ground the court held that the order denying substitution was not appealable.

That is a far cry from this case. The consent decree gives the United States a continuing role in this action, authorizing it by the usual provisions to inspect the records of the defendant, to interview its officers, and to require reports from it; retaining jurisdiction to enable any of the parties to apply "for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof"; and providing that at any time after five years the United States might apply for vacation or modification of the Judgment. It is patent that the United States had an interest in the very application here made. As the plaintiff at whose instance the decree was entered, the United States had a stake in having the bargain performed according to its understanding of what had been agreed; if appellants are right in saying that the decree required ASCAP to grant the type of license they sought, ASCAP's refusal would thus present an issue of compliance on which the United States might well desire to be heard. On the other hand, if appellants are seeking to impose on ASCAP obligations it had not undertaken, the United States might have an interest in opposing, because of the adverse effect such a precedent might have on its ability to obtain consent decrees in other cases, or for substantive reasons. Indeed, the United States did submit two memoranda to the District Court. In the first it took the position "that should the applicant show their request to be reasonable, in our opinion, the judgment requires ASCAP to offer a license of the type requested," and in the second it went further in aligning itself with appellants. Although this is not a requisite to the applicability of the 60-day provision, the

Government could thus have appealed from the dismissal of appellants' applications—although we cannot now be altogether sure to what court such an appeal would have lain. Similarly if the United States had sided with ASCAP in the district court, it could have appealed from an order granting appellants' applications. Indeed, when the case was last here, the United States did participate to the extent of urging that the appeal be dismissed for want of jurisdiction on our part.

Appellee responds to such considerations by saying, with no little force, that however all this might seem if we were free to exercise our judgment, the Supreme Court has conclusively determined that "The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned." 375 U. S. at 40. But we cannot assume the Supreme Court thus meant to force us to hold the appeal untimely. If the Court had thought its language had the controlling effect for which appellee contends, it would not initially have reversed our judgment and remanded to us for consideration on the merits, but would have denied certiorari or affirmed on the ground of untimeliness, which appellee's brief in opposition to the grant of certiorari had urged as an alternative support for our dismissal of the appeal. Also the dissent on the order on rehearing makes it clear that the entire Court considered the issue of timeliness to be fairly open for our consideration on remand. The reconciliation between the Supreme Court's view on the applicability of the Expediting Act and ours on the applicability of the 60-day rule may be that the controversy is within the stream of the Government's interest although not within "the main stream." To what-

ever extent the 60-day rule requires that the Government be more than a nominal party, we hold that the requirement was satisfied here, and that the appeal to this court thus was timely.

II.

The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948).

The request which the appellant television stations made of ASCAP on October 18, 1961, was for new blanket and per program licenses[3] that would exclude not only pro-

[3] Under the "blanket" license in effect at the time, payment consisted, generally speaking, of a "Sustaining Fee" of an amount per month equal to the station's highest charge for a quarter-hour of television broadcasting, and a "Commercial Fee" of 2.05% of its net receipts from sponsors for local televisson programs, subject to certain exclusions. Under the "per program" license the station paid a "Commercial Fee" equal to 4% of its net receipts from sponsors for local commercial television programs consisting of films produced originally for use in motion picture theatres and making only incidental use of ASCAP music and 9% of such net receipts on other local commercial television programs using ASCAP music, both subject to certain exclusions, plus a "Sustaining Fee" of 3½% of the charge on sustaining programs using ASCAP music.

grams obtained from a television network, comprising some 62% of the program time of network affiliated stations, as was the case in the licenses previously negotiated,[4] but also programs consisting of filmed or taped material made by independent film producers, comprising some 68% of the broadcasters' non-network program time. The economic effect of a license thus restricted would be that either the producer would have to make his own performance licensing arrangements with ASCAP or the copyright owner, or the television station would have to negotiate these on an individual basis before broadcasting; the complications incident to the latter alternative would be likely to cause the former generally to be the practical result. ASCAP refused to grant the request for the new form of licenses and the District Court declined to require it to do so.

Appellants place prime reliance on the opening sentence of Section IX(A) of the Judgment, which says:

> "Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested."

Although a strictly literal reading of this would indeed require ASCAP to quote a fee for any type of license requested, such a reading ignores both context and good

[4] Such licenses had been negotiated in 1940, 1954 and 1958. Until 1949 ASCAP had granted television stations royalty-free licenses in an endeavor to assist the stations and promote the growth of the industry.

sense. The sentence is the springboard for a complicated set of provisions, stretching over two printed pages, which prescribe the mechanics for arriving at reasonable fees; the purpose of Section IX was to describe *how* fees were to be set for licenses that ASCAP was bound to grant, not to delineate ASCAP's obligations to grant them. Appellants' counsel concedes that ASCAP was not bound to grant every kind of license which the ingenuity or whim of hundreds of television station owners could devise; commendable and necessary as the concession is, it undermines the argument for a literal reading. We construe the sentence as relating to requests for licenses which some other portion of the Judgment required ASCAP to grant.

The first section of the Judgment mandating the issuance of licenses is Section V. This requires ASCAP "to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory . . . (A) To a radio broadcasting network, telecasting network or wired music service . . . *on terms which . . . do not require a separate license for each station or subscriber for such performances*"; "(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes . . . of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in

the United States enumerated by the licensee, *without requiring separate licenses for such enumerated stations for such performances,*" and "(C) To any person engaged in producing motion pictures" as therein described. (Emphasis supplied). Manifestly appellants are not within Section V, although the italicized clauses of (A) and (B) have a bearing that we will consider below. Passing Section VI for the moment, we come to Section VII, which is so important that we set it out in full in the margin.[5]

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[5] "VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(Continued on page B12)

Section VII appears to be the [illegible] where the draftsmen set down in detail what license individual broadcasters could demand. The only type of license specifically required in all cases is the [illegible]r program license, although Section VII(B) (3) in the case there considered requires that ASCAP shall take action that will give "a genuine economic choice between per program and blanket licenses" and Section VIII, which is not restricted to radio or television, orders ASCAP "to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses." Nothing in Section VII requires a license which excludes programs recorded by producers or, for that matter, distributed by networks.

(Continued from page B11)

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that *such* stations shall have a genuine economic choice *between per program and blanket licenses;*

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license."

It is true, however, and this is the crux of the case, that Section VII must be read along with the clauses of Section V(A) and (B) which we have italicized. Appellants make no complaint as to the manner in which the existing licenses deal with the network problem covered by Section V(A); the licenses are limited to local television programs and these are so defined as to exclude network programs. The complaint is that the situation dealt with in Section V(B) is handled differently, by a provision in the blanket license that

> "No payment shall be required hereunder with respect to a local commercial television program of LICENSEE presented by motion picture or by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the source to perform on such local commercial television program by means of such motion picture or such transcription, as the case may be, the musical compositions embodied therein."

and a somewhat broader provision in the per program license excluding payment where a license was granted at the source either by ASCAP or by the composers, authors, or publishers. If producers uniformly cleared at the source as the networks do, the effect of the two differently worded provisions would seem identical. Appellants' grievance is that, as they offered to prove, producers have not cleared at the source and the exclusionary provision as to programs filmed or taped has thus been of no practical value to the broadcasters.

Although we assume that Section V(B) would entitle a producer to a license that would wholly exempt "enumerated stations" from any need of a license, we are unable to find any provision in the Judgment that entitled television stations to demand licenses excluding programs thus produced. The provisions of Section V(A) and (B) requiring ASCAP to license networks and producers in a manner that will relieve their members and customers of the need of obtaining separate licenses seem to have been designed for the benefit of the networks and the producers, not for that of the television stations, whose rights are specified in Section VII. Section V orders ASCAP to grant licenses that will *permit* networks and producers to clear at the source, and this it has done. Appellants demand a license which, as a practical matter, will *require* producers to do so. That the existing licenses leave such clearance at the option of the producer of the non-network program, who has scant incentive to obtain this, does not seem to us to deny any rights which the Judgment confers on television stations.[6] It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depends in no small degree, that defendants who sign them should know these will not be stretched beyond their terms. *Hughes* v. *United States*, 342 U. S. 353, 357 (1952); *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 23 (1959).

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[6] Although appellants are clearly not precluded from seeking a change in the *status quo*, we cannot regard the decade of acquiescence in the existing types of license as wholly irrelevant to the construction of the Judgment.

The final string to appellants' bow is Section VI, which we quote in the margin.[7] Appellants would have us read the first sentence as requiring ASCAP to grant a license for all compositions in the ASCAP repertory to whatever extent "any user" demanded. The answer is similar to that made in respect of Section IX(A). General language of this sort, applying to all kinds of users, cannot fairly be read as overriding the specific and detailed provisions relating to television stations, networks and producers. Section VI was addressed to an altogether different problem; what it says is that ASCAP must place itself in a position where, without the members' assent, it can grant the request of any applicant who wants the whole ASCAP repertory but that it may not grant a license for particular compositions without the member's request or notice to him.

We have not overlooked appellants' argument that ASCAP's refusal to issue the type of license they request has anti-competitive consequences which should lead us to resolve ambiguities in their favor. But, apart from the fact that the Judgment does not appear to us to be truly ambiguous, we are faced with ASCAP's answer that the

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[7] "VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter."

relief sought by appellants would be seriously detrimental to independent music writers and would itself adversely affect competition by facilitating the activities of Broadcast Music, Inc., a music licensing and publishing organization controlled by the combined television and radio broadcasting industry. If appellants' position in fact has the merit under the antitrust laws which they assert, they have effective remedies available, either by persuading the Department of Justice to apply under Section XVII for a modification of the Judgment, or by a private suit which our ruling here in no way affects. *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683, 689 (1961). We decide only that the District Court did not err in holding that the Judgment as it now stands does not require ASCAP to issue licenses of the sort appellants requested.

Affirmed.

APPENDIX C

Opinion of District Court

[Caption Omitted]

OPINION

RYAN, *J.*

This petition, filed by more than 335 local television stations situated throughout the United States, seeks fixation of a reasonable royalty for a license under Section IX(A) and (B) of the Amended Consent Judgment, entered on March 14, 1950 in the antitrust suit entitled *United States* v. *ASCAP*. While theoretically the petition is brought under the provisions of the decree for the fixing of fees, what it really seeks from ASCAP is a radically different license from that under which petitioners have been operating under the decree for the past twelve years and only secondly the fixing of a reasonable fee for such license.

The type of license sought is neither the blanket nor per program license described in the judgment. Petitioners would have a composite sort of license, containing a little bit of both, which would grant them the right to use any, some or all of the compositions of ASCAP's repertory on all their locally-originated broadcasts, while excluding from such license music performing rights for network programs and prerecorded material produced after February 28, 1962 by persons other than petitioners; as to those, petitioners would demand that the rights be secured, cleared and paid for at the source.

Petitioners made written application to ASCAP for such license and upon ASCAP's refusal to issue such license, they filed the petition now before us.

Opinion of District Court

The underlying and immediate question raised by this petition is the court's power under the decree to compel ASCAP to issue such license; until that is determined the question of a fee under such license is not reached.

It is petitioners' position that the power to fix reasonable fees encompasses the power to fix a type of license which the court finds to be reasonable; that this construction of the decree is justified by the objectives and purposes of the judgment and that consequently no amendment to the decree is necessary in order to grant the application.

The government is in accord with petitioners on the principle that if the court finds the type of license requested to be reasonable, it has the power to compel its issuance; it, however, expresses no opinion on the reasonableness of the license. And it is ASCAP's position that, apart from the express prohibitions and restrictions as to the types of licenses it may not force on an applicant and the affirmative duty it has to offer upon request by an applicant a choice of the types of license enumerated in the judgment, it is free to negotiate with an applicant for a particular kind of license on particular terms, and that, therefore, the court lacks power to direct the issuance of the license sought, irrespective of its reasonableness (which it strenuously disputes).

We agree with the position taken by ASCAP, for the mere fact that a particular license requested may be more reasonable than that which has been given in the past does not impose upon ASCAP the duty to grant such license,

nor does it give the court additional powers not contained in the amended judgment.

Until 1949 ASCAP had granted royalty-free licenses to all television stations for the use of its repertory; this was in an endeavor to assist the stations and to enable the industry to gain stability. In 1948 ASCAP suggested that the television industry negotiate with it for television licenses. Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; substantially the same provisions were contained in each agreement. The petitioners, all local stations, have operated and continue to operate under a local blanket license granting them the right to play the entire repertory of ASCAP on all locally-originated programs. For this license they pay a fee which is based on a percentage of their "net receipts from sponsors", excluding any transcribed programs which ASCAP licenses at the source. Petitioners, dissatisfied with this type of license, would have the court cast the burden of paying for the performance rights on the pre-recorded programs on the producers rather than on petitioners; a right and option which the producers now have under their decree and which ASCAP is compelled to grant them. ¶ V-B

Nowhere in the judgment is there any provision explicitly or impliedly requiring ASCAP to issue the type of license requested, and petitioners do not so argue. They do argue, however, that the granting of such license would further the objectives of the judgment as a whole whereas a denial would frustrate them, and that looking beyond the

exact wo. ..ng of the decree, as a court of equity must, the power of this court to compel the issuance of the license sought is clear.

More specifically, petitioners in support of their application point to Sections VI and IX as giving this court "broad equitable powers" to grant the type of license they seek.

Section VI provides for the granting of a non-exclusive license to perform "all of the compositions in the ASCAP repertory." While this provision standing alone might lend itself to an interpretation that "all" could encompass a direction to grant licenses on "any or some" as desired by an applicant, when read with the sentence following it and with the other provisions of the judgment, particularly Section VII (B) and (C), it is clear that "all" refers to a license to include the entire repertory as distinguished from the other type of license which is limited to one or more specified compositions. The balance of this Section VI deals with just such a license.

The entire Section IX, which speaks of a fee for the "license requested" following application for a license on "any, some or all" of the compositions, deals with the procedure for determining reasonable license fees, not types of licenses. The words "license requested" do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have this court fix the fee. Each section of the Amended Judgment must be read and interpreted in the light of the entire judgment. (*Swift & Co.* v. *United*

States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928).) The words "license requested" do not remove the limitations as the extent, type and nature of licenses found in the other provisions of the judgment.

In Section IV (E), ASCAP is restrained from negotiating with any motion picture theatre exhibitor for a license to exhibit movies that use its compositions. This section makes no mention of television broadcasters, who are in many respects similarly situated to the theatre exhibitors. It is plain that the television broadcasters were not intended to be included within the prohibitions of Section IV (E).

Section VII deals primarily with the computation of fees for radio and television broadcasting. Section VII (B) provides that ASCAP must issue per-program licenses, on written request, and that the stations be given an economic choice between per-program and blanket licenses—there its obligation ends. There is no mention made of any type of license other than per-program or blanket. Section VIII refers to "the various types of licenses", clearly a reference to Section VII (B) and the licenses there described, the economic choice between per-program and blanket licenses, and the fees therefor, and again no other type license is mentioned.

Petitioners urge that the type of license they seek would give greater effect to provisions of the Amended Judgment, which, they argue, is rendered ineffectual by the present type of broadcasting licenses. If this be so (and we make no finding either way), relief could only be

had by a reappraisal of the Amended Judgment to determine if a further amendment were warranted; this only after hearings on a petition filed for such relief by a party to the suit.

Petitioners were not parties to the judgment; they have standing only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant. Here we do not have a petition for modification of the consent judgment filed by a party to the judgment.

The petition will be entertained if petitioners so elect to proceed within ten (10) days from the date hereof, as one filed for fixation of reasonable fees on a renewal of the type of license that is now and for many years past has been held by them.

Dated New York, September 14th, 1962.

/s/ Sylvester J. Ryan
U. S. D. J.

APPENDIX D

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

[3408]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants*.	Civil Action No. 13—95 AMENDED FINAL JUDGMENT

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

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Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

NOW, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

[3410]

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical com-

positions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for [3411]
motic picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

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V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public per-

formance of compositions in the ASCAP repertory as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting or simultaneous performances by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring sepa-

rate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements [3413]
and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid

a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

[3414]

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

Amended Final Judgment, United States v. *ASCAP, Entered March 14, 1950*

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified [3415]

amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the

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ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order of judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground

for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of

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ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidi-

ary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintai

[3418]

ing or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

Amended Final Judgment, United States v. *ASCAP, Entered March 14, 1950*

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

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(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of reve-

nue, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives
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of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to defendant, be permitted, (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out

of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby or-

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dered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

XVIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved:

March 14, 1950

HENRY W. GODDARD
United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

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By LOUIS D. FROHLICH

Judgment entered:

WILLIAM V. CONNELL
Clerk

March 14, 1950

Office Supreme Court, U.S.
FILED
JUN 4 1964
JOHN F. DAVIS, CLERK

No. 1071

IN THE

Supreme Court of the United States

October Term, 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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June 4, 1964

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Question Presented

The narrow question presented by the petition is whether the Amended Final Judgment* entered in 1950 on the consent of the parties in the Government's antitrust action against respondent (*United States* v. *American Society of Composers, Authors and Publishers*, S.D.N.Y. Civ. No. 13-95) requires respondent to grant licenses that would

* Printed as Appendix D to the petition, pp. D1-D18.

exclude from their television coverage all program material pre-recorded by others than petitioners, such as motion pictures, television films and pre-taped shows, whether or not that material contained copyrighted music in the ASCAP repertory.

This artificially exclusory form of license was collectively sought in 1961 by a group representing two-thirds of the nation's television stations (petitioners) for the first time since those stations began taking commercial performing right licenses from ASCAP in 1949. This exclusory form of license would, perforce, shift petitioners' obligation to pay for their own broadcast performances of ASCAP copyrighted music to independent producers, who are not required under the Copyright Act, 17 U.S.C. §1 et seq., to purchase performing rights since they, unlike petitioners, do not perform music in public for profit.

Statement

Before the organization of ASCAP, there was no effective method by which individual writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit.

The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could take the measures necessary to negotiate licenses with them or to detect and prove unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of copyright infringement had no practical

means of obtaining licenses from the individual owners of all those works.

As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated membership association representing both writers and publishers.

Today ASCAP has over 7,000 writer members and 2,000 publisher members, who grant to ASCAP non-exclusive rights to license the public performance of the copyrighted works that they have composed or published. Through the Society the works of its members are made readily available to over 35,000 enterprises located throughout the United States without the burden and necessity of clearing each work separately.

The Society's licensees include all the television and radio networks and over 500 commercial television stations and 4,000 radio stations.

The television networks and almost all the television stations have elected to secure blanket licenses from the Society, entitling them to use all or any portion of the works in the Society's repertory on any program they present without separately accounting for each use. These licenses obviate, for both the user and the copyright owner, the countless complex and expensive individual negotiations that would otherwise be required, and greatly facilitate the free flow of high quality music to the public.

The present type of blanket license held by appellants was painstakingly negotiated between the Society and the television industry in 1949 for the period 1949 through 1953 (R.-Vol. II, A12-13). That type of license was later renewed for the period 1954-1957; and again for the period

1958-1961 (R. Vol. II, A13-14). Thus appellants have never before sought the arbitrarily circumscribed and artificially exclusory type of license they now demand.

Both Chief Judge Ryan, who has had eight years of experience in administering the Amended Final Judgment, and a unanimous Court of Appeals for the Second Circuit, found that the Judgment did not require ASCAP to grant this "radically different" license (Pet., p. C1). The demanded form of exclusory license would inevitably force the many independent producers to bargain in the dark with thousands of copyright owners or with ASCAP for television performing rights without knowing whether, or the extent to which, their productions would be performed on television. The damage to individual rights would be disastrous.

Argument

The decision below is clearly correct. Moreover, it neither involved nor turned on any question of general importance beyond the confines of the carefully drawn, very specialized, and carefully administered consent decree here involved.

The right of the Government to seek modification of the consent decree as a party thereto, as well as the right of petitioners to bring an independent private antitrust suit, are in no way affected by the decision below. That decision held only "that the District Court did not err in holding that the Judgment as it now stands does not require ASCAP to issue licenses of the sort appellants requested." (Pet., p. B16).

Accordingly, there is no reason for further review of the holdings of the two courts below, which were based on the same, narrowly delineated ground.

I.

The Decision Below Is Clearly Correct

1. Petitioners contend that the Amended Final Judgment compels ASCAP to grant them licenses that would exclude from their coverage all program material pre-recorded by others than petitioners, including material clearly containing copyrighted ASCAP music.

Petitioners seek to base their contention not upon the specific language of any provision of the decree requiring ASCAP to grant the license demanded, but rather upon the general language of Sections VI and IX(A), which provide, respectively, (i) that ASCAP must license all its musical works to any license applicant and (ii) that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested."

As the Court of Appeals pointed out, the above quoted language of Section IX(A) relates to "requests for licenses which some other portion of the Judgment required ASCAP to grant." It is therefore necessary to consider the other provisions of the Judgment, particularly "the specific and detailed provisions relating to television stations, networks and producers" (Pet., p. B15).

One of those provisions, Section VII, sets forth the special duties owed by ASCAP to broadcaster licensees. Its language makes clear that the only license that ASCAP "is ordered and directed" to issue to them upon request is a "per program" license—*i.e.*, a license the fees for which are based on "*each* program in which compositions in the

SCAP repertory shall be performed", whether or not ose programs are pre-recorded.*

* Section VII of the Amended Final Judgment provides:

"Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license." (Pet., pp. D9-D10)

For greater convenience to the broadcaster in selecting music and reporting its use, ASCAP is also permitted, but not ordered, under Section VII(A) to issue a "blanket" license—if requested by a broadcaster—the fee for which is based on all the broadcaster's programs, whether or not they contain ASCAP music.

ASCAP is not required by Section VII, or by any other provision of the decree, to grant to a broadcaster a license excluding programs containing ASCAP music because such programs have been pre-recorded by others than the broadcaster. (See the opinion of the Court of Appeals, Pet., pp. B11-B12.)

The other provision, Section V(B) of the Amended Final Judgment, orders ASCAP to issue—to any producer who so requests—a license covering compositions "recorded for performance on specified commercially sponsored radio programs or television programs" presented by stations enumerated by the producer.

Section V(B) orders ASCAP to *permit* independent producers to obtain television performing rights if they wish to do so as a means of facilitating the marketing of their products. As the Court of Appeals noted, Section V(B) was thus designed for the benefit of independent producers to give them the *option* of clearing their program materials through ASCAP. However, the form of license now demanded by petitioners, by exempting pre-recorded programs from the stations' licenses, would inevitably *require* independent producers to obtain television performing rights from ASCAP as a pre-requisite to the successful marketing of their products. (Pet., p. B14)

The independent producer would have to bargain with many individual copyright owners or with ASCAP for

performing rights licenses before he even knew whether, or to what extent, his productions would be presented on television. Only the television stations—of which petitioners constitute at least two-thirds—have the power to determine what pre-recorded material they will present.

The Court of Appeals therefore properly rejected petitioners' argument, concluding: (a) that the general language of Sections VI and IX, "applying to all kinds of users, cannot fairly be read as overriding the specific and detailed provisions [of Sections V and VII] relating to television stations, networks and producers", and (b) that petitioners' reading of that general language "ignores both context and good sense." (Pet., pp. B9-B10, B15).*

* Taken literally, petitioners' reading would compel ASCAP to grant licenses differing in their terms in as many myriad ways as the individual preferences of thousands of music licensees might devise. In an effort to avoid such an impermissible result, petitioners necessarily conceded below "that ASCAP was not bound to grant every kind of license which the ingenuity or whim of hundreds of television station owners could devise" (Pet., p. B10), and were reduced to arguing there, as they do here, that ASCAP is only required to grant licenses "reasonably" requested. But this argument does not help petitioners either. What may seem reasonable for an applicant to request may be equally reasonable for ASCAP to refuse. Indeed, this is why contract terms are negotiated by businessmen instead of being written for them by courts.

It is indisputable that the existing licenses held by petitioners are reasonable since they conform to the provisions of Section VII and have been issued to television stations since 1949 at their own request. Were the District Court to begin writing "reasonable" contract terms to fit the individual needs of the thousands of commercial music users who might be unwilling to work out their differences with ASCAP, little other judicial business could be done in the Southern District of New York.

Moreover, petitioners' argument would require ASCAP to grant many different types of licenses to licensees of the same class of music user. Such a requirement would obstruct compliance with Section IV(C) of the Judgment, which enjoins ASCAP from discriminating "in license fees or other terms and conditions between licensees similarly situated" (Pet., p. D4).

2. Nor is there any basis for petitioners' charge that the Court of Appeals ignored the background of the Amended Final Judgment. Rather, that court began its discussion by noting that the Judgment was designed in part to remedy limitations in the earlier, 1941 decree—*i.e.*, the lack of (i) provisions specifically addressed to the licensing of *television* performances and (ii) provisions for the judicial determination of reasonable license fees.

In seeking to rely on the general language of Sections VI and IX, petitioners claim that the conclusions reached in *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888, *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948), and *M. Witmark* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which were before the District Court when it entered the Amended Final Judgment in 1950, are equally applicable to the licensing of pre-recorded material for broadcast by television stations.

Petitioners thus argue that the solution adopted by the judgment—on consent of the parties—for the licensing of motion picture performance rights for exhibition in theatres should now be applied to the telecasting of pre-recorded material—over the opposition of ASCAP and contrary to the plain meaning of the Amended Final Judgment.

The judgment entered in the *Alden-Rochelle* action was vacated on March 14, 1950 at the time of the entry of the Amended Final Judgment, which completely superseded the *Alden-Rochelle* judgment. Specific language was set forth in the Amended Final Judgment to take account of the practices at issue in *Alden-Rochelle*.

Thus, for example, under Section V(C) ASCAP is required to issue, upon request, "to any person engaged in

producing motion pictures . . . a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses" (Pet., p. D7).

Section IV(E) of the Judgment prohibits ASCAP from granting licenses for motion picture performance rights to "any motion picture theatre exhibitor" (Pet., p. D4). Significantly, this section makes no mention of any prohibition against licensing television stations to exhibit films or other pre-recorded material over television.

It is clear from the *Alden-Rochelle* opinion, underlying this language of the Amended Final Judgment, that the motion picture performance right referred to in the Judgment consisted of the right to perform musical works in motion picture theatres, and did not relate to the different medium of public communication and entertainment represented by the telecasting of pre-recorded program material.

There is a sound reason for that differentiation. The economic disadvantage faced by the individual theatre owner in dealing with ASCAP is entirely different from the enormous bargaining power wielded by the wealthy, powerful and highly organized broadcasting industry.

The broadcasters combine together for their negotiations with ASCAP. They also collectively own a captive music publishing and performing rights organization, Broadcast Music, Inc., through which they jointly control a large and increasing supply of subsidized music.

Although television was well established in 1950, and although the Amended Final Judgment expressly took account of this medium (see, *e.g.*, Sections VII and V(B)), nothing in the Judgment prevents ASCAP from licensing

to television stations the performing rights for the works in the ASCAP repertory that are pre-recorded in motion pictures, television films, or other program material.

Appellants concurred in this construction of the Judgment for a dozen years by demanding, receiving, and paying ASCAP for the right to telecast the music contained in such pre-recorded material.*

II.

No Important Federal Question Is Presented

1. The petition does not bring to this Court any important federal question. All that is involved here is an interpretation of a carefully worked out decree as it relates to a particular class of music users, the television broadcasters.

The unique complexities of the music industry and its relationships with independent producers, networks, and individual stations have little bearing on other areas of the national economy. As stated *supra*, pp. 2-3, the creation and use of music is characterized by the imperative need of the thousands of individual copyright owners to cooperate in licensing authorized users and in policing infringements, and the equally imperative need of commercial music users to have an efficient and speedy means of advance clearance for any compositions they desire to perform.

The decisions below rested on no principles of general application, other than the sound and salutary recognition by both the District Court and the Court of Appeals

* The Court of Appeals noted that "we cannot regard the decade of acquiescence in the existing types of licenses as wholly irrelevant to the construction of the Judgment" (Pet., p. B14).

that ASCAP, as a party to a consent decree entered without any findings or adjudication of illegality, was entitled to rely on its unambiguous terms. See *Hughes* v. *United States*, 342 U.S. 353, 357 (1952); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959).

2. Petitioners' claim that anticompetitive effects will flow from the interpretation placed on the decree by the courts below is completely unsupported by evidence and is not worthy of review. That claim, even if it were true (which it is not), would be irrelevant in this proceeding.

As the Court of Appeals found, ASCAP has a right to rely on the terms of the decree as it now stands. If the abuses petitioners professedly fear were to arise, or if there should be deficiencies in the consent decree, adequate remedies are available for dealing with them. If the Government believed that petitioners' contention had merit, it could apply to the District Court for modification of the decree, or the petitioners could institute an independent private suit to remedy their alleged injury.

It is also significant that the Government has not sought review of the District Court's dismissal of this proceeding and has not supported petitioners in their efforts on appeal.

Accordingly, there is no justification for twisting the language of the Judgment so as to amend it at the instance of petitioners who are not parties to the Judgment and without following the clear and carefully prescribed procedures for its amendment. (Pet., pp. B16, C5-C6).

In addition to the lack of substance in petitioners' contention, the relief requested by petitioners would itself

produce serious anticompetitive injury. As the Court of Appeals stated in rejecting this contention of petitioners, "we are faced with ASCAP's answer that the relief sought by appellants would be seriously detrimental to independent music writers and would itself adversely affect competition by facilitating the activities of Broadcast Music, Inc., a music licensing and publishing organization controlled by the combined television and radio broadcasting industry" (Pet., p. B16).

For example, as detailed in the ASCAP Answer (R. Vol. I, pp. 68a-71a), in anticipation of this proceeding Broadcast Music, Inc. ("BMI") has operated what amounts to a slush fund for predatory and destructive bargaining.* A large portion of BMI's licensing revenues, instead of being distributed to the writers and publishers who license their works through BMI, has been accumulated and used for entering into contractual arrangements with strategically selected music writers and publishers and for subsidizing producers of television program materials.

Under those arrangements certain writers and publishers receive, on a discriminatory basis, substantial subsidies and guarantees (which ASCAP is forbidden by the Judgment to grant), not measured by performing uses of their works, but in return for licensing their works through BMI and not through ASCAP or any other licensing organization.

The producers, instead of paying for the use of works, *are paid* for agreeing to insert specified amounts of BMI-licensed music in their program materials. Thus today many producers of television program materials fill certain

* Petitioners own almost 60% of the stock of BMI.

of their music needs out of the BMI repertory at either no cost whatsoever or at cut rate prices offered solely as part of a program to destroy the bargaining power of independent music writers and publishers who are not affiliated with or subject to the control of the broadcasting industry.

It takes little imagination to perceive how the unique and special kind of license petitioners (constituting two-thirds of the nation's television stations) now would like to have from ASCAP, would slide into an agreed slot in the broadcaster-BMI scheme to dominate copyrighted music, to destroy ASCAP, to deny independent music writers and publishers their bargaining rights, and to deprive the public of the free flow of the music it enjoys.

The provisions of Section IX of the Judgment for the fixing of reasonable fees for licenses were never intended as a vehicle for the trial of complex and time-consuming antitrust charges and countercharges of the sort that petitioners and ASCAP have alleged against each other.

CONCLUSION

This case presents a very narrow and particularized issue that is not one of general public importance warranting the consideration of this Court. The decision below was correct, and the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 1071

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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ASCAP's argument, like the decision of the courts below, shows the need for clarification by this Court of the principles to be applied in construing third-party beneficiary provisions of antitrust consent decrees, of which many have been entered by district courts in recent years.

In its argument opposing certiorari ASCAP proceeds (as did the courts below) on the false assumption that the antitrust decree against it must be interpreted in a way that

allows it the maximum of freedom to exercise its independent business judgment in fixing the terms and conditions on which to make its repertory available to music users. There might be some force in ASCAP's contentions as to the desirability of having music licenses "negotiated by business men instead of being written for them by courts" (ASCAP's Brief, p. 8 fn.) if petitioners were dealing with independent music publishers and composers. In fact, however, petitioners are dealing not with the composers and publishers severally but with ASCAP, a combination of music publishers and composers that dominates the business of licensing copyrighted music. Acting as a combination, the ASCAP members cannot expect to enjoy the same unlimited freedom and discretion that they would enjoy individually. If the Amended Final Judgment can be interpreted so as to deprive ASCAP of its power to impose license terms of its own choosing on music users, it should be so interpreted.

ASCAP's contention that, despite the broad compulsory licensing directions expressed in Sections VI and IX(A) of the Amended Final Judgment, Section VII(B), which by its terms deals only with the method of computing the fee under ASCAP's broadcaster licenses, constitutes the sole limitation placed by the Judgment on ASCAP's power to fix the terms of broadcasters' licenses, proceeds from the false assumption described above. While Section VII(B) provides that, in the case of "per program" licenses, ASCAP may charge a fee based upon the payment of a specified sum, or a portion of the broadcasters' revenues,

from each program using ASCAP music, the opening lines of Section VII(B) make it clear that by their terms these provisions refer only to the fee and not to any other aspect of the license. For the reasons stated above and in the petition for certiorari, this limited provision should not be broadened into an authorization to ASCAP to refuse to issue a license to a broadcaster seeking a license covering some but less than all of his programs. The only conclusion that can fairly be drawn from Section VII(B) is that if the broadcaster seeks a "per program" license ASCAP can compel him to pay a fee with respect to all programs using ASCAP's music that are covered by the license. That Section VII(B) has, in fact, no broader implications is confirmed by the terms of ASCAP's existing "LOCAL STATION PER PROGRAM TELEVISION LICENSE"—so designated by ASCAP (R. 118a)—which expressly excludes network and cooperative programs from the coverage of the license and does not require the licensee to make any fee payments to ASCAP with respect to such excluded programs (R. 122a, 129a-130a).

There is no merit in ASCAP's further contention that petitioners' application was properly dismissed because a proceeding under Section IX of the Judgment is an inappropriate vehicle for resolving the "complex and time-consuming antitrust charges" interposed in ASCAP's answer to petitioners' license application (ASCAP's Brief, p. 14). ASCAP cannot, simply by injecting antitrust charges (which are unsupported by any record evidence) by way of its answer filed in the licensing proceeding, deprive petitioners of their right to a hearing in a fee-fixing

proceeding under Section IX. What, if any, relevance ASCAP's various antitrust claims may have in a Section IX proceeding was not determined by either court below, since petitioners' application was dismissed as a matter of law, and need not be decided here.

Respectfully submitted,

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